IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 14TH FEBRUARY 2007 / 25TH MAGHA 1928

RSA.No. 819 of 2006()

AS.51/2000 of SUB COURT,NEYYATTINKARA
OS.526/96 OF PRINCIPAL MUNSIFF COURT, NEYYATTINKARA

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APPELLANTS/APPELLANTS/DEFENDANTS

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1. SAROJINI AMMA, AGED 51 YEARS,
   D/O.THANKAMMA PILLAI, RESIDING AT PULLIYIL
   VEEDU, KOTTUKAL DESOM, KOTTUKAL PAKUTHY.

2. A.S.SREEKUMARI, AGED 36 YEARS,
   D/O.SAROJINI AMMA, DO. DO.

BY ADV. SRI.B.HARISH KUMAR
SRI.AYYAPPAN SANKAR

RESPONDENT/RESPONDENT/ PLAINTIFF

SANDHYA, AGED 27 YEARS,
D/O.CHANDRIKA, RESIDING AT CHANDRIKA VILASOM
PUTHEN VEEDU, MANALUVILA, EDAKKADU DESOM,
PALLICHAL VILLAGE, NEYYATTINKARA TALUK.

BY ADV. SRI.V.CHITAMBARESH
SRI.T.C.SURESH MENON

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 14/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

R.S.A .NO. 819 OF 2006

Dated 14th February 2007

J U D G M E N T

Appellants are defendants in O.S.536/96 on the file of Munsiff court, Neyyattinkara. Respondent is the plaintiff. Respondent filed the suit for declaration of title and for putting up of boundary. Plaint schedule property is 4 cents in survey No.141/10 A (Re-survery No.174/6) of Kottukkal village of Neyyattinkara Taluk. First defendant Thankamma Pillai was the mother of Pankajakshan Nair. Respondent is the daughter of Pankajanshnan Nair. Thankamma Pillai executed Ext.B1 settlement deed No.2384/1980 whereunder property was gifted to Pankajakshan Nair. Thereafter Pankajakshan Nair and first defendant executed Ext.A1 exchange deed No.1779/86 whereunder plaint schedule property was given to Pankajakshnan Nair and B schedule property therein was given to first defendant. According to respondent on the death of Pankajakshnan Nair, his rights devolved on respondent and she has therefore title to the plaint

schedule property and is entitled to the decree sought for. Appellants filed written statement contending that after execution of Ext.B1 Thankamma Pillai cancelled Ext.B1 under Ext.B3 cancellation deed on 16/1/1991 and assigned the property in favour of first appellant under Ext.B4 document No.1796/1977 and therefore on the death of Pankajakshnan Nair he had no right over plaint schedule property and therefore respondent has no title and is not also entitled to the decree sought for. Appellants also contended that suit is bad for non-joinder of necessary parties without mentioning who are the necessary parties.

2. Learned Munsiff framed necessary issues. On the evidence of Pws.1 to 4 on the side of respondent and Dws.1 to 3 on the side of appellants and Exts.A1 to A6 and Exts.B1 to B8 and Ext.C1 report and Ext.C1(a) plan, learned Munsiff found that property covered under Ext.B1 was gifted to Pankajakshnan Nair and the gift was accepted and acted upon and subsequently under Ext.A1 exchange deed property obtained under Ext.B1 was exchanged with first appellant and therefore under Section 126 of Transfer of Properties Act donor Thankamma Pillai is not entitled to cancel the gift

deed which has already been acted upon and therefore Ext.B3 is invalid and the rights of Pankajakshnan Nair under Ext.B1 and Ext.A1 are not effected by Ext.B3. It was found that first appellant who admitted Ext.B1 and exchanged the property under Ext.A1 is not entitled to contend that Ext.B1 gift deed has not been acted upon and as Ext.B3 cancellation deed is invalid first appellant did not derive any right under Ext.B4 sale deed and therefore respondent has title to plaint schedule property. Learned Munsiff granted a decree declaring the title and injunction restraining appellants from trespassing into plaint schedule property. Accepting Ext.C1(a) plan, respondent was permitted to put up boundary through BU, UT and TA line as shown in Ext.C1(a) plan. Appellants challenged the decree and judgment before Sub court, Neyyattinkara in A.S.51/2000. Learned Sub Judge on reappreciation of evidence confirmed the findings, but modified decree to the effect that respondent is entitled to put up boundary through BU and UT line shown in Ext.C1(a) plan. The appeal was dismissed. Appellants are challenging the decree and judgment in second appeal.

3. Substantial questions of law raised by the appellants are whether courts below were justified in not dismissing the suit for non joinder of necessary parties and whether court was correct in ignoring Ext.B2 settlement deed and granting a decree for declaration discarding the law governing intestate succession of property of Hindu male.

4. Learned counsel appearing for appellants was heard.

5. Arguments of learned counsel appearing for appellants was that courts below did not property consider the evidence and Ext.B9 produced before first appellate court establish that Thankamma Pillai, mother of Pankajakshan Nair was alive when suit was filed and therefore on the death of Pankajakshan Nair his half right devolved on the mother and therefore respondent cannot claim to be the sole heir of Pankajakshan Nair and therefore respondent is not entitled to the decree for declaration sought for and therefore decree granted is to be set aside.

6. Judgments of learned Munsiff and learned Sub Judge establish that such a contention was not raised before the trial court or appellate court. A copy of

written statement, made available at the time of argument, establish that apart from raising a vague contention that suit is bad for non joinder of necessary parties appellants have no case that on the death of Pankajakshnan Nair his right also devolved on his mother who was alive then and therefore respondent is not the sole heir. Question is whether without pleading, appellants are entitled to put forth a new case at second appellate stage.

7. A copy of appeal memorandum of first appeal was also made available. It also reveals that there was no case for appellants even before first appellate court that on the death of Pankajakshnan Nair his rights devolved on his mother also and so respondent has no exclusive title. In the absence of such a pleading, appellants are not entitled to challenge the decree granted by courts below, on a new case not put forth earlier and set up at the second appellate stage. Learned counsel appearing for appellants submitted that before the first appellate court Ext.B9 death certificate was produced and in the affidavit filed along with that application appellants contended that on the death of Pankajakshnan Nair his rights devolved

on the mother. But the recitals in the affidavit cannot be taken as a pleading or substitute for grounds in the appeal memorandum. No substantial question of law is involved in the appeal.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.